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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 890

EDWARD JOHN WILLIAMS and EVELYN WALKER,
Petitioners,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Petitioners pray that a writ of certiorari issue to review the judgment of the Michigan Supreme Court entered in the above-entitled cause on December 4, 1962.

OPINION BELOW

The opinion of the Michigan Supreme Court is reported in — Mich. —, 118 N.W. 2nd 391: a copy of the opinion is printed in Appendix B, *infra* pages 15-24.

JURISDICTION

The Judgment of the Michigan Supreme Court was entered on December 4, 1962. Jurisdiction of this Court is invoked pursuant to 28 U.S.C., 1257 (3) which permits this court to review cases from a State court in which there is a substantial Federal question.

STATUTES INVOLVED

The statutory provisions involved are Michigan Comp. Laws 1948, Sec. 750.360, which is set forth in Appendix A.

QUESTIONS INVOLVED

1. Does the Michigan rule which restricts consideration of the legality of a search and seizure to the preliminary examination testimony deny the defendant due process of law?

2. Is a search of an automobile four (4) hours after the arrest of the Defendants without a warrant in violation of the 14th Amendment to the United States Constitution?

STATEMENT OF FACTS

On September 16, 1960, Petitioners Edward John Williams and Evelyn Walker were arraigned on a warrant charging breaking and entering a building during the night with intent to commit larceny. Following a preliminary examination on October 5, 1960, they were bound over

for trial on that count and on an added count of Larceny from a building.

The arresting officers were called to the premises by a radio run summoning them to investigate someone throwing boxes on a lawn (Petitioners' appendix 14a, 21a). Upon their arrival they were met by a citizen, Chester Pilat, who said that he was driving into a driveway when he saw a man run between the houses, and he requested one of the officers to accompany him into his home to see if it had been burglarized (Petitioners' Appendix 25a, 29a). The testimony is conflicting as to whether he said anything else. One officer, William Hayes, claimed Pilat told him he saw a man rolling a wrapped tire toward the car and putting it underneath the trunk (Petitioners' Appendix, 15a, 22a). However, he made no mention of this conversation in his arrest report (Petitioners Appendix, 23a). The alleged informant, Chester Pilat, emphatically denies making any statement regarding a tire (Petitioners' Appendix, 26a, 27a and 28a), and gave defense counsel a sworn affidavit to that effect before the trial (Petitioners' Appendix, 8a, 9a). Morris Kunka, another officer present at the arrest states that Chester Pilat approached him first, that he accompanied Pilat into the house and as they came out he told Hayes, who was by the car, to check that car because it was strange to the neighborhood (Petitioners' Appendix, 24a, 25a).

He further asserted that Pilat did not make any statements regarding a tire before the defendants were removed from the car (Petitioners' Appendix, 25a). Donald Black, another officer stated that he heard someone mention a tire, but that was all he knew about it (Petitioners' Appendix, 29a).

The fourth officer Clavio Gallerani also stated that he saw Patrolman Kunka go with Pilat into the house and also heard him tell Hayes to check the car when he returned, but he never heard Chester Pilat mention a tire (Petitioners' Appendix, 30a).

At the time the officers arrested the Petitioners, who were in the car, they searched them and the car. They asked for a key to the trunk, were informed that there hadn't been a key for several months, and they searched the premises and the car thoroughly in an attempt to find one (Petitioners' Appendix, 17a, 18a). They did not know at that time that a crime had been committed, but they took the petitioners and the car to the station, booked the petitioners on suspicion, and placed the car in the pound (Petitioner's Appendix, 18a, 29a). Several hours later a larceny in a gas station was reported and that time, without a warrant, the trunk of the petitioners' car was searched and the tires were found (Petitioners' Appendix, 18a, 24a, 29a).

Based on the above facts, the Petitioners moved to suppress the evidence because it was illegally seized and to quash the information (Petitioners' Appendix, 3a, through 8a). The Honorable Gerald Groat, Judge of the Recorders Court for the City of Detroit, refused to consider Pilat's Affidavit which was appended to the motion (Petitioners' Appendix, 11a) and he denied the motion (Petitioner's Appendix, 12a).

The Petitioners were tried before the Honorable George Murphy, Judge of the Recorder's Court of the City of Detroit, sitting without a jury, on January 11, 1961. On January 17, 1961, they were found guilty of the second count (Petitioners' Appendix, 1a). Petitioners' motion for a new trial was denied (Petitioner's Appendix, 2a) and

upon rehearing it was again denied (Petitioners' Appendix, 2a). Petitioners appealed to the Michigan Supreme Court for leave and the Judgment was affirmed on December 4, 1962.

REASONS FOR GRANTING WRIT

1. Prior to trial the Petitioners moved to suppress the evidence which was found when the arresting officers tore out the back seat of the car, on the ground that such evidence was found as the result of an illegal search and seizure and should be suppressed. The Trial Judge denied the motion on the grounds that the evidence was seized as an incident to a lawful arrest. The Petitioners appealed the case to the Michigan Supreme Court setting forth as one of the grounds for said appeal, the denial of the motion to suppress the evidence at the trial. The Michigan Supreme Court affirmed the trial court's decision supporting the affirmance by a series of Michigan cases which had held that only the evidence adduced at the preliminary hearing could be considered when ruling on the legality of a search.

It is the Petitioners' contention that the Michigan procedural rule restricting consideration of the legality of a search to the preliminary examination proofs denies the Petitioners the protection of the Fourth Amendment which applies to the states through the Fourteenth Amendment by virtue of this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961).

The legality of a search depends on all the facts incident to that search and not merely on the facts which are proven at the preliminary examination. The purpose of

a preliminary examination in Michigan is to determine if there is sufficient evidence to bind an accused over for trial. Defense counsel at that time does not necessarily, or even usually, know the nature of the prosecution's case. He does not know the nature of the witnesses' testimony nor what type of investigation this testimony will indicate is necessary. At the time of the preliminary examination, the nature of the evidence supporting the prosecution is exclusively within the knowledge of the prosecutor. Because the constitutional guarantee against illegal search and seizure is of such magnitude and so "inherent in the concept of ordered liberty" at any time the evidence indicates that an arrest was made without a warrant only on general suspicion and especially without any knowledge of the commission of a specific crime as in the instant case, the fruits of that illegal arrest and search should be immediately suppressed, regardless of the stage of the proceedings.

This rule has been recognized by this Court in *Giordenello v. United States*, 357 U.S. 480 (1957), wherein the Court said that waiver of the preliminary examination provided for in Rule 5 of the Federal Rules of Criminal procedure did not waive the right to contest the legality of the search. The Court said (at pages 483, 484):

> "A crime of this nature may involve legal issues of subtlety and complexity it would be unfair to require a defendant to present so soon after arrest, and in many instances, as here, before a final selection of counsel.
>
> "In addition, examination of the purpose of the preliminary examination before a Commissioner makes evident the unsoundness of the Government's position. • • •

> "By waiving preliminary examination a defendant waives no more than the right which the examination was intended to secure him—the right not to be held in the absence of a finding by the Commissioner of probable cause that he has committed an offense."
>
> *"By the same token, the Commissioner here had no authority to adjudicate the admissibility at petitioner's later trial of the heroin taken from his person."* (Emphasis added.)

This case clearly indicates that the defendant must have a right to question the legality of an arrest and search at any time and that his rights cannot be finally adjudicated at a preliminary stage of the proceedings. Furthermore, numerous Supreme Court decisions have indicated that the legality of a search and seizure must be considered in light of the trial testimony. In *Rios v. United States*, 364 U.S. 253 (1960) at page 260 the Supreme Court discussed in detail the necessity for considering the legality of a search in light of all the testimony and not merely that of the preliminary proofs. In the *Rios* case the facts were very similar to the facts in the instant case. The question which would determine the legality of the search was the moment at which the arrest occurred. In that case, a taxi cab was stopped by the police officers and the defendant was seen dropping a readily recognizable package of narcotics. The preliminary proofs indicated that the arrest was made after the officers saw the defendant drop the narcotics. Based upon this testimony, a preliminary motion to suppress the evidence was denied because the arrest was made after a felony was committed in the presence of the arresting officers. However, the taxi cab driver testified at the trial that the arrest was made immediately after he stopped and the narcotics were found after the defendant was al-

ready in custody. The trial judge denied a motion to suppress at that time, holding himself to be bound by the preliminary testimony and the prior ruling on a similar motion. The Supreme Court reversed, stating that the ruling on the motion must take into consideration the testimony of the taxi cab driver.

In *Gouled v. United States*, 255 U.S. 298 (1921) the Supreme Court spoke directly to the point which is now at issue, when they said:

> "In the case we are considering, the certificate shows that a motion to return the papers seized under the search warrant was made before the trial and was denied, and that on the trial of the case, before another Judge, this ruling was treated as conclusive although, as we have seen, in the progress of the trial, it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the papers when they were offered in evidence against the defendant."

The Court also said in the same case:

> "(W)here in the progress of a trial it becomes possible that there has been an unconstitutional seizure of these papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question *as then presented* even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." (Emphasis added.)

See also *Waldron v. United States*, 219 Fed. 2nd 37 (D.C. Cir. 1955); *Cohen v. United States*, 278 U.S. 221 (1929); and *DiBella v. United States*, 369 U.S. 121 (1962).

The subsequent events in the instant case indicate the danger of restricting the consideration of the merits of a claim of illegal seizure to the evidence at the preliminary hearing. One of the key questions in this case was the legality of the arrest, and the determination of this question rested solely upon the knowledge that the arresting officer had at the time he arrested the defendants. At the preliminary hearing the arresting officer, officer Hayes, testified that the actions of the officers which culminated in the arrest of the Petitioners were predicated upon information received from Chester Pilat, a resident in that area. Yet, Pilat testified at the trial that he did not see anyone running with a tire, nor did he say anything at all to the officers about a tire; all he said was that he saw a man running through the alley and that he was afraid his home had been burglarized.

Furthermore, the testimony of the other three officers present at the arrest indicates that the sequence of events was such that it would have been impossible for officer Hayes to have talked to Pilat preceding the arrest of the Petitioners. The testimony of officers Black, Gallerani, and Kunka indicates that the two scout cars arrived at the scene almost simultaneously. Black noticed the boxes on the lawn and he and his partner Hayes went to investigate. At that time, the door of a car parked in the driveway opened and Pilat walked out and approached officer Kunka, who was and had been a friend of his for years. He asked what was going on and then told Kunka that he had seen a man running through the alley and thought that his house may have been burglarized. Kunka accompanied Pilat to the house and looked for signs indicating a burglary. Upon being satisfied that the house had not been touched, they went outside again. Pilat then told Kunka that one of the

cars parked down the street was a strange car to the neighborhood. At that time Kunka yelled to Hayes who was busy with the boxes, to check the car. Hayes shone the flashlight into the car and the petitioners sat up. Without further interrogation, Hayes told the petitioners to get out of the car, put their hands on the roof, and searched them and seized certain articles such as gloves, pliers, etc.

After the search and seizure, the officers then proceeded to interrogate the petitioners, took them in and booked them and held them until a crime had been reported and then tore out the back seat of the car and obtained the tires. The testimony of all the officers and Chester Pilat substantiates this outline of the sequence of events preceding and following the arrest of the petitioners. The only officer whose testimony differs in any material respect is Hayes, the only officer called at the preliminary examination. The credibility of his testimony is colored by his subsequent testimony at the trial. It was brought out that no mention of any conversation with Pilat was contained in the original report, and yet this purported conversation allegedly was what made him believe a crime may have been committed and formed the basis for his arrest. The discrediting character of the substantial omission such as this was recognized by this Court in *Jencks v. United States*, 353 U.S. 657 (1957) when it said:

> "Flat contradiction between the witnesses' testimony and the version of events given in his reports is not the only test of inconsistency. *The omission from the report of facts related at the trial*, or a contract (sic) in emphasis upon the same facts or even a different order of treatment are also relevant to the cross-examining process of testing the credibility of the witnesses' trial testimony." (Emphasis added.)

Furthermore, Hayes stated first that the conversation about the tires was held in the presence of the petitioners, and a few questions later said that it was the conversation about the tires that led him to discover and arrest the petitioners. When the inconsistency between these two answers was pointed out, he then stated that there were two conversations, one in the presence of the petitioners and one without their presence in which the said statements were made. To hold that the testimony taken at the preliminary examination is the only evidence which can be considered to determine the merits of the assertion of the petitioners' Constitutional rights would be highly unfair. This is especially so when the subsequent testimony in the trial completely contradicts the testimony at the preliminary examination.

It is very significant in this regard that neither Chester Pilat, whose statements allegedly gave rise to the arrest, nor any of the other arresting officers were called to testify at the preliminary examination. Certainly the declarant who saw the defendant rolling the tire would be better qualified to testify to this fact than the officer who merely heard him say he saw the defendants. The petitioners suggest that the prosecutor and the police knew that Pilat's testimony would destroy the validity of the arrest. The conclusions in this regard are obvious. They knew that the Petitioners not being present could not disprove officer Hayes' claim of a conversation with Pilat. They also knew that if Pilat were not called by the Prosecutor that the defendant certainly would not call him, because they would be bound by his testimony without knowing what he would say. Furthermore, in the light of the Michigan rule requiring the consideration of the legality of the search to be restricted to the preliminary examination testimony, the testimony discrediting the search would not be able to subsequently reverse the decision of the preliminary magistrate.

In *Mapp v. Ohio*, 367 U.S. 643 (1961) this Court held that the states are bound by the Federal exclusionary rule. The Michigan procedural rule permits the effect of the *Mapp* decision to be circumvented by keeping out of the preliminary examination all testimony which would indicate that a search was illegal. This Court should take this opportunity to define the extent of the *Mapp* decision so that the states cannot use illegally seized evidence against defendants who cannot prove the illegal search on the basis of the preliminary examination proofs. The Michigan Rule as promulgated in the instant case, and the many cases preceding it, is in direct conflict with numerous United States Supreme Court decisions which require that the validity of an arrest and search must be tested in the light of all testimony relevant to that search regardless of when this testimony is brought out during the course of the proceedings.

2. The decision of the trial court that the search was legal was based upon the theory that the search was incident to a lawful arrest and therefore an exception to the requirements of the Fourth Amendment. The exceptions to the rule that a search may only take place pursuant to a validly issued search warrant have been jealously and carefully guarded; search incident to a lawful arrest is among them. See *Jones v. United States*, 357 U.S. 493 (1958). Where the defendants and the automobile which was searched have been in the continuous custody of the police, a search of the automobile without a warrant four hours after an arrest is not incident thereto, and is flagrantly unconstitutional. In *United States v. Scott*, 149 Fed. Supp. 837 (D.C. D.C. 1957) the Federal Court pointed out that the reason for this exception is to permit the officer to search the place which the accused has under his control. It is clear that the exception does not apply in the instant

case since the car was in the police pound for approximately four hours before it was searched and therefore was in the control of the police.

There is no reason why a search warrant could not be obtained if the officers at that time had probable cause therefor. In *Rent v. United States*, 209 Fed. 2d 893 (4th Cir. 1954) and *Papani v. United States*, 84 Fed. 2d 169 (5th Cir. 1936) it was pointed out that the right to search incident to the arrest is limited to searches contemporaneously conducted. In *People v. Kalpak*, 10 Ill. 2d 411, 140 N.E. 2d 736 (1957) where an arrest was made for a felony committed in the presence of the arresting officers, and therefore clearly valid, the return to the place of arrest one and one-half hours later to search for and seize the instruments used to commit the crime is not in any sense incidental to the arrest and is therefore illegal when conducted without a warrant. In light of these decisions it is clear that the search of the car in which the tires were found was not incidental to the arrest of the Petitioners and was therefore in violation of the Fourth Amendment to the United States Constitution. This Court should take this opportunity to define how far the exception to the Fourth Amendment can be extended without violation of the Constitutional principles upon which this amendment rests.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a writ of certiorari should be granted.

Respectfully submitted,

GOLDFARB and HUDNUT,
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Dated: Detroit 26, Michigan,
this 1st day of March, 1963.

APPENDIX A

C.L. 1948, §750.360 (Stat. Ann. 1954 Rev. §28.592), which reads:

> "Any person who shall commit the crime of larceny by stealing in any dwelling house, house trailer, office, store, gasoline service station, shop, warehouse, mill, factory, hotel, school, barn, granary, ship, boat, vessel, church, house of worship, locker room or any building used by the public shall be guilty of a felony."

APPENDIX B

People of the State of Michigan,
Plaintiff and Appellee,
v.
Edward John Williams and Evelyn Walker,
Defendants and Appellants.

No. 54.

Supreme Court of Michigan

Dec. 4, 1962.

Frank J. Kelley, Atty. Gen., Eugene Krasicky, Sol. Gen., Samuel H. Olsen, Pros. Atty., Samuel J. Torina, Chief Appellate Lawyer, Detroit, for the People.

Albert A. Goldfarb, Detroit, for defendants and appellants.

DETHMERS, JUSTICE.

Before the Entire Bench, except ADAMS, J.

Defendants were convicted of larceny in a building. The parties agree that the applicable statute is C.L. 1948, §750.360 (Stat. Ann. 1954 Rev. §28.592), which reads:

> "Any person who shall commit the crime of larceny by stealing in any dwelling house, house trailer, office, store, gasoline service station, shop, warehouse, mill, factory, hotel, school, barn, granary, ship, boat, vessel, church, house of worship, locker room or any building used by the public shall be guilty of a felony."

The structure in which the people allege the larceny occurred is described as being 7 feet, 7 inches high, 15 feet, 1 inch long, and 33 inches wide. According to the owner's testimony it is constructed of metal, attached to the land, bolted down to cement, entirely enclosed, a covered shed, it has overlapping doors with a steel bar coming down through the outside door and a padlock attached through the steel rod. In it tires were stored and displayed in 2 tiers, with a capacity for 100 tires. It had been constructed on the premises and located about 38 feet from the main gasoline service station building located on the same premises. On the night in question the doors had been closed and locked, but afterwards the mentioned rod on the door had been sawed apart, the lock removed, the door opened, and 5 tires taken.

[1] Is the structure in which the larceny was committed a building within the meaning of the quoted statute? Defendants say it is merely a tire rack. They suggest that it comes within the meaning of C.L. 1948, §750.114 (Stat. Ann. §28.309), making it a misdemeanor to break

and enter, with intent to commit the crime of larceny, "any outside show-case or other outside enclosed counter used for the display of goods * * *". We think the structure here involved is considerably more than a show case or counter in the ordinarily accepted sense of the terms.

Defendants cite Rouse v. Catskill & N. Y. Steamboat Co., 59 Hun 80, 13 N.Y.S. 126, in which it was held that a vessel is not a building within the meaning of an ordinance prohibiting the sale of liquor in a building; Town of Union v. Ziller, 151 Miss. 467, 118 So. 293, 60 A.L.R. 1155, in which a metal billboard was held not to be a building under an ordinance prohibiting metal buildings; Trueschell v. Gay, 13 Gray 311, 79 Mass. 311, in which a wall around 3 sides of the stack of an iron furnace to protect the stack from earth sliding down a hill behind it is not a building within the lien law, to permit a lien to attach to it; Whiteley v. Mayor and City Council of Baltimore, 113 Md. 541, 77 A. 882, in which it was held that, in a street opening proceeding in which it was required that a map be filed showing lots and buildings to be taken, it was not necessary to show a portable schoolhouse thereon because it was intended to be there only temporarily and was not a building to be taken or destroyed for the street opening; Bailey v. Ohio, 26 Ohio Cir. Ct. 375, in which a chicken coop 37¾ inches by 38 inches by 2 feet high, which was moved from place to place and not attached to the ground, was not a building within the meaning of a statute defining burglary as breaking and entering any building, because lacking any permanency of location as a structure. These are of scant assistance to defendants here with respect to the structure of the size, permanent character and type of construction and attachment to the realty here involved.

In Truesdell the following was said:

> "The word 'building' cannot be held to include every species of erection on land, such as fences, gates or other like structures. Taken in its broadest sense, it can mean only an erection intended for use and occupation as a habitation or for some purpose of trade, manufacture, ornament or use, constituting a fabric or edifice, such as a house, a store, a church, a shed."

This structure comes well within this definition of a building.

In Sanchez v. People, 142 Colo. 58, 349 P.2d 561, 78 A.L.R.2d 775, we find in the syllabi (P.2d) the following:

> "1. All stationary structures within State, no matter of what substance they may be constructed, are within term 'building' as used in burglary statute, so long as they are designed for use in position in which they are fixed.
>
> "2. Although a telephone booth may be only a closet by dictionary definition when within another structure, it is a 'building' within purview of burglary statute when set apart. * * *
>
> "4. Under statute defining burglary as entry with felonious intent into any building, defendant who was prying cover off coin box in outside telephone booth was guilty of 'burglary'."

By the same token, whatever term might be applicable to the structure here involved if it were inside another building, set apart and outside, as it was, it was a building within the meaning of the applicable statute.

[2] Was evidence taken by officers from defendants' car (5 automobile tires) unlawfully seized and, therefore, should it have been suppressed as such upon defendants'

motion to suppress filed and heard by the court in advance of trial?

At the preliminary examination the arresting officer testified, in substance, that at about 3:30 a. m., while assigned to scout a certain area, he received radio instructions to go to a specific location because of a report of the presence there of a suspicious looking man; that the officer went as directed and saw a citizen on the sidewalk who told him that he had seen a suspicious man rolling a new, packaged or wrapped tire on the street toward an automobile still parked nearby and that the man had placed the tire either in the trunk or under the rear end of the car; that he, the officer, thought this might mean that the tire had been stolen because at that hour of the night no tire sales place was open in that neighborhood in which a new tire might be purchased; that, in consequence, he shined a flashlight into the car and found the two defendants hiding in the front of the car, lying in a prone position; that he thought the tire might be in the car; that he then asked for the key to the trunk, but defendants said they had not had one for years; that the officer asked the male defendant what he had done with the tire he had been rolling down the street and that he denied having it; that he then arrested defendants and searched them; that in the male defendant's pocket he found a pair of pliers, a paring knife, tan gloves, and a hacksaw; that after taking defendants and the car a report came about the 5 tires having been stolen from the structure above described; that thereafter the officers gained access to the trunk through the rear seat and found 5 new tires identified by the owner as those taken from said structure, the tires having marked thereon the name and location of another gasoline station in which he was a partner.

We think the above was sufficient to give rise to probable cause for the officers to believe that a crime had been committed by defendants and warranted the arrest and search of defendants and subsequent search of the car. A reasonable mind could hardly have concluded otherwise on the basis of such knowledge and information.

[3] Defendants seek to inject into the consideration of this problem testimony later taken on trial, which they urge as refuting the officers' testimony at the examination bearing on that question of probable cause and validity of the search and seizure and, hence, admissibility of the tires into evidence. This is not permissible. In People v. Taylor, 341 Mich. 570, 67 N.W. 2d 698, and cases cited therein, we have held that the illegality of seizure of evidence, where such illegality is known before trial, must first be raised by a timely motion to suppress the evidence made before trial. Here the facts relating to the alleged illegality of the search and seizure were as well known to defendants at the time made as at time of trial. Timely motion in advance of trial was, therefore, required. It was so made, but denied before trial on the basis of the testimony adduced at the examination. In People v. Zeigler, 358 Mich. 355, 100 N.W.2d 456, we said:

> "What about probable cause in the case at bar? The only showing before the circuit court on the motion to suppress consisted of the testimony presented at the preliminary examination. Amplifying testimony later taken at trial cannot be considered. We are limited to that taken at the examination. People v. Miller, supra [245 Mich. 115, 222 N.W. 151]."

In People v. Miller, 245 Mich. 115, 222 N.W. 151, the following appears:

> "Determination of motions to dismiss a criminal charge against accused and to suppress the evidence obtained by a search of accused's automobile rests upon the showing at the preliminary examination, and therefore testimony later taken on the trial, amplifying the circumstances of the search, may not be considered by the Supreme Court in reviewing denial of the motions." Syllabus 1.

In People v. Willis, 243 Mich. 164, 219 N.W. 609, the second syllabus contains the following:

> "Where the matter of the search and its legality was gone into before the trial, upon motion to suppress the evidence obtained thereby, and the motion was denied, the matter should not again be gone into on the trial, but the prosecution had a right to offer the liquor in evidence, and the jury were in no way concerned with the manner in which it had been secured, and the same rule applies in trial before the court without a jury."

To the same effect are People v. Kerwin, 234 Mich. 686, 209 N.W. 157, and People v. Kramer, 260 Mich. 94, 244 N.W. 243.

The trial court did not err in denying motions to suppress evidence.

[4] Finally, defendants say the finding of guilt by the trial judge is contrary to the great weight of the evidence. That voices, of course, a civil case test. The question, properly stated (People v. Moore, 306 Mich. 29, 10 N.W. 2d 296), is whether the evidence was ample to warrant a finding of guilty beyond a reasonable doubt of the crime charged. In Gablick v. People, 40 Mich. 292, this Court said:

> "Possession of stolen property, if immediately subsequent to the larceny, may sometimes be almost conclusive of guilt (see Walker v. People, 38 Mich.

156); but the presumption weakens with the time that has elapsed, and may scarcely arise at all if others besides the accused have had equal access with himself to the place where it is discovered."

Here defendants had possession shortly after the offense must have been committed, minutes after a man was seen rolling a new, wrapped tire to the car. It does not appear that anyone other than defendants had had access to the car before the officers took it into possession nor thereafter until they gained access, through taking apart the back seat, into the trunk and found the 5 tires, identified by the owner as stolen from his place of business. The fact that defendants were hiding in the car, that they denied having had a key to the trunk though the 5 freshly stolen tires were soon thereafter found therein, that one defendant had a hacksaw in his pocket and that the bracket to which the padlock was attached had been sawed apart, testimony as to all of this adds up, it seems to us, to enough to support a finding of guilt beyond a reasonable doubt.

Affirmed.

CARR, C. J., and KELLY, SOURIS, SMITH and ADAMS, JJ., concurred with DETHMERS, J.

BLACK and KAVANAGH, JJ., concurred in result.

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PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

(APPENDIX C)

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APPENDIX C

ORDER OF MICHIGAN SUPREME COURT AFFIRMING JUDGMENT OF LOWER COURT

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fourth day of December in the year of our Lord one thousand nine hundred and sixty-two.

Present the Honorable Leland W. Carr, Chief Justice; John R. Dethmers, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Theodore Souris, Otis M. Smith, Paul L. Adams, Associate Justices.

This cause having been brought to this Court by appeal from Recorder's Court for the City of Detroit, and having been argued by counsel, and due deliberation had thereon, it is now ordered by the Court that the judgment and sentence of the lower court be and the same is hereby affirmed. Justice Adams did not participate.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Supreme Court at Lansing, this 9th day of March in the year of our Lord one thousand nine hundred and sixty-two.

Donald F. Winters,
Clerk.

(Seal)

Office Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1962

EDWARD JOHN WILLIAMS and EVELYN WALKER, Petitioners, vs. THE PEOPLE OF THE STATE OF MICHIGAN, Respondent.	No. 890

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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SPEAKER-HINES AND THOMAS, INC., LANSING, MICH.—1963

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ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Michigan Supreme Court is printed in Apendix B of the petition (pages 15-22). The order and opinion of the Judge of Recorder's Court, City of Detroit, denying petitioners' motion to suppress evidence is printed as respondent's Appendix B (5b-8b).

Questions Presented

1. Were the petitioners' federal constitutional rights violated by the introduction at the trial of evidence obtained as the result of search after their arrest where the testimony of police officers established there was probable cause to believe a felony was committed and the testimony of one witness contradicts the police officers testimony and, if believed, would establish that there was no probable cause to believe a felony was committed and the court accepted the testimony of the police officers?

2. Were the petitioners' federal constitutional rights violated by the introduction at their trial of evidence obtained as the result of a seizure of stolen property occurring approximately four hours after the lawful arrest of the petitioners, while in the automobile, when the police officers had reason to believe the car contained stolen property and at the time of their arrest had made a search of the passenger section of the automobile but, due to the refusal of the petitioners to furnish a key for the trunk, did not at the time of the arrest force open the trunk but held the automobile and later made their examination of the trunk at the police station where they were able to enter the trunk without damaging the automobile?

Statutes Involved

Michigan Code of Criminal Procedure, Chapter VI, Examination of Offenders, Sections 1 through 13, CL 1948, Sections 766.1 through 766.13, MSA 28.919 through 28.931 is set forth in respondent's Appendix C (8b-13b).

Statement of the Case

Petitioners' statement is incomplete and argumentative. Respondent's counterstatement of the case is as follows:

The petitioners were arrested in the City of Detroit on September 15, 1960 at approximately 3:30 A.M. (13-14b). On September 16, 1960 petitioners were arraigned on a warrant charging breaking and entering a building during the nighttime with intent to commit larceny.

Michigan procedure requires an examination for the purpose of determining whether competent evidence exists to establish that a crime has been committed and that there is probable cause to believe the defendant committed the crime (8-13b).

Examination was scheduled for December 26, 1960. This was adjourned over the objection of the petitioners until October 5, 1960 (3b). On October 5, 1960 the examination was held and the petitioners were represented by an attorney. At the preliminary examination, Police Officer Hayes testified that on September 15, 1960, he went to 13620 Asbury Park (17b) and arrived at approximately 3:30 A.M. (17b) in answer to a radio run (—suspicious man) (14b); that when he arrived there a citizen was on the sidewalk who said he saw a suspicious man rolling a new tire towards that car, and put it underneath the back of it (14b, 17b); that it was a packaged tire, in other words had a wrapper on it (14b); and he pointed out the car (17b); that he shined a flashlight in the car and found two people (15b) in a prone position hiding on the front seat of the automobile whom he identified as the petitioners (14b, 15b); that he thought the tire might be in that car (15b); that he arrested them because he felt that a crime

had been committed, either a larceny from an auto or a breaking and entering (18b); that he searched Williams and found a pair of pliers in Williams' pocket, a paring knife, tan gloves and a hacksaw (15b); that he asked for a key to the trunk and was told they hadn't had one for years (16b); that they searched the car and the immediate area around the car and were not able to find it (19b); that the police took the car into custody and held it as evidence (16b), pending discovery of where the crime had taken place (20b); that later he found five tires in the trunk of petitioners' car by taking out the rear seating and going in the back (16b). He also stated that, about 6:00 A.M., the police had a run to the gas station on Schoolcraft; that they found the tire rack had been broken into and five tires taken (20b).

Petitioners objected to the testimony of Officer Hayes. However, Judge Gillis, the examining magistrate, permitted the testimony for purposes of examination.

The petitioners called no witnesses and offered no other evidence before the examining magistrate in support of their present position although specifically allowed to do so by statute (12b).

Defendants were bound over for breaking and entering a business place in the nighttime with intent to commit larceny and larceny from a building (6b).

On October 31, 1960 the petitioners filed a motion to suppress the evidence alleging in substance that the search was unreasonable and attacking the credibility of the police officer who testified at the examination (1b-5b). The basis for this motion was an affidavit by a person claiming they had not said what the police officer claimed they said at the examination (4b).

The motions were denied. The Judge found that the examination testimony established the arrest as being based on probable cause and the search which ensued was authorized by law. Regarding the affidavit the Court said (6b, 7b):

> "The decision on the motion to suppress must be governed by the examination proofs, which must for its purposes be accepted as true. The examining magistrate neither heard the testimony of Pilat nor had before him the affidavit. This court cannot now resolve disputed issues of fact, and must consequently disregard the affidavit at this juncture. Was the arrest proper under the circumstances? The answer to that question will control the decision here."

The petitioners did not move to have the case remanded to the examining magistrate for the purpose of introducing additional testimony as they may do under Michigan law but proceeded to trial. The petitioners waived the right to trial by jury (Petition, page 4).

At the trial on January 16, 1961 the entire matter of what occurred at the time of the arrest and search was thoroughly examined (20b-53b). Officer Hayes gave substantially the same testimony he gave at the examination (20b-36b). In addition, Police Officer Kunka testified as follows:

> "• • • Mr. Pilat was there, and we were there, and Mr. Pilat did mention that the man had a tire laying on the street directly underneath the trunk of that car; wasn't there then, so I asked the defendant, 'What did you do with the tire?' He said, 'What tire; I don't know nothing about a tire.' I said, 'Give me the key to your trunk.' He said, 'I don't have a key to the trunk.' He did admit being the man behind the car that ran

through the yard, but he said he ran through the alley because he had to go to toilet. And he kept insisting there was no tire, and Mr. Pilat then says, don't let him lie to you. The tire was laying right there underneath the trunk on the street. So that is why we took him in" (37b)

Mr. Pilat testified that he had not made a statement regarding the tires (42b).

Police officer Black testified that at the time of the arrest he searched the car on the inside as far as he could without the trunk key. (46b) Officer Gallerani testified and his testimony supported the testimony of officers Hayes, Kunka and Black (49b).

The trial judge allowed the tires to be admitted into evidence and at the conclusion of the trial found the petitioners guilty of larceny from a building. Petitioners appealed to the Michigan Supreme Court and the judgment was affirmed.

ARGUMENT

I

PETITIONERS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE FACT THAT THE TRIAL JUDGE RESOLVED A CONFLICT OF TESTIMONY IN FAVOR OF THE PEOPLE.

The petitioners, with respect to the first question they present on page 2 of their petition, are attempting to make a federal constitutional question out of the pure factual issue which was resolved against them by the trier of the facts at the trial. The question petitioners present presup-

poses a Michigan rule which is alleged to hold that questions regarding the legality of a search are restricted without exception to the examination and that once the examination is over petitioners can no longer raise the question. This is not the law.

The basic rule in Michigan is substantially the same as the rule followed by federal courts. Rule 41(e), Rules of Criminal Procedure, in part provides as follows:

> "The motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

The Michigan Supreme Court in its decision in this case restated the Michigan Rule as follows:

> "In People v. Taylor, 341 Mich. 570, 67 N.W. 2d 698, and cases cited therein, we have held that the illegality of seizure of evidence, where such illegality is known before trial, must first be raised by a timely motion to suppress the evidence made before trial. Here the facts relating to the alleged illegality of the search and seizure were as well known to defendants at the time made as at time of trial. Timely motion in advance of trial was, therefore, required. * *"

The trial judge denied the motion. However, as under federal procedure, he had the authority to consider the motion and grant it upon a showing that the search was unlawful. The court may so decide regardless of what occurred prior to the trial. This was pointed out by the Michigan Supreme Court in 1926 in *People v. Bass*, 235 Mich. 588. The first syllabus states the rule:

"Where, in a criminal prosecution, defendant's counsel, during the trial, learned that evidence had been obtained by a search of defendant's room without a search warrant, it was within the discretion of the trial judge to then send the jury out, permit defendant to make a motion to suppress, hear the testimony on the motion, and determine it, and the Supreme Court should reverse if there was an abuse of discretion."

The Michigan procedure for questioning the validity of search prior to trial is also basically the same as the procedure followed in federal courts except, as pointed out in the Supreme Court decision, the motion to quash in Michigan must ordinarily be made at the examination. This difference exists primarily because the examining magistrate in Michigan has the authority to consider the motion and because the defendant is not required to file his motion in the Circuit Court or Recorders Court.

The following excerpts from *People v. Vulje*, 223 Mich. 656, decided in 1923 outlines briefly the procedure followed:

"When arrest of an accused follows execution of a search warrant the question of its validity can be raised by him as soon as he is taken before the magistrate. He is entitled to an examination, unless he expressly waives it, before that court where the warrant is returned and affidavits in support of it filed and the whole matter open for investigation. Then, in case of an adverse ruling, those proceedings are returned with and as a part of the examination, ready for review in the circuit court, if he so desires and timely moves for such action. But even if under any special circumstances he may, in the discretion of the trial court, first raise the question before it and there move for suppression of the evidence and dismissal,

> he should at least make his motion timely and in compliance with the rules of that court."

This case concerned a search warrant however the procedure is the same in cases of a search without a warrant.

The decision made at the examination, absent special circumstances, is ordinarily binding on the defendant and he may not relitigate the matter either before or at the trial. This is in accord with federal decisions. U.S. v. Wheeler, D.D. Pa. 1959; 172 Fed 2d 278, affirmed 275 Fed. 2d 94; U.S. v. Wheeler, D.C. Pa. 1957, 149 Fed Sup 445; U.S. v. Jenning, D.C. D.C. 1956, 19 FRD 314. However, unlike the rule in federal cases as demonstrated by U.S. v. Koenig, C.A. Fla. 1961, 290 Fed 2d 166, if the examining magistrate grants the motion to suppress, the trial judge has no jurisdiction to proceed.

The petitioners allege, in effect, that this procedure denies the defendant due process of law. His argument in support of his proposition ignores the well established procedure outlined above and the facts as they existed in this case. Petitioners were represented by counsel at the examination and in view of the long established Michigan practice with respect to the purpose of the examination, counsel must have been aware of the fact that he could not ignore the legal effect of the judge's ruling. In spite of this, petitioners presented no witnesses or other evidence at the examination. Nor did the petitioners ask for an adjournment to allow additional time. To the contrary, the petitioners objected to the state's request for an adjournment from September 26, 1960 until October 5, 1960.

Later the petitioners made a motion to quash based on an affidavit attacking the credibility of the people's witness at the examination. The judge in the lower court denied

the motion, holding the examination testimony must be accepted as true and only the examining magistrate could examine the question of credibility now raised (5b).

Petitioners were apparently satisfied with this decision, since they did not request that the case be remanded for further examination for the purpose of placing their witness on the stand. Had the petitioners done this, the examining magistrate would then have weighed his testimony with the testimony of the police officer. The petitioners did not do this, but rather they waited until trial to raise the question again which they could not do, since they were well aware of the circumstances of the search and seizure and the fact that the legality of the search could only be reopened by remanding the case for further examination. It is not known why the petitioners did not ask for remand; however, since this would have settled the matter once and for all, the petitioners apparently preferred to take their chances at the trial and at the same time hope for a reversal on a point of law on appeal. Petitioners' failure in this regard cannot be considered a basis for reversal.

It is recognized that a rule of practice must not be allowed for technical reasons to prevail over a constitutional right, Gouled v. U.S. 255 U.S. 298. However, as pointed out in Mapp v. Ohio, 367 U.S. 643, footnote 9, page 659, where state procedure is fairly designed to protect the rights of defendant, it must be respected. It is also recognized that a technical rule will not prevail when in the course of the trial it becomes apparent that the evidence was illegally seized.

In the present case, although the petitioners attempt to disregard the fact, the trial judge in the exercise of his discretion considered the entire question of the legality

of the arrest and the search and seizure. (20b-53b) Both the People's witnesses and the defendants' witnesses were heard. The testimony of the police officers and the testimony of the defendants witness was in conflict and, this being the case, the trial judge, since the case was tried without a jury, decided who was telling the truth. The credibility of the witnesses was resolved against the petitioners and this decision by the trial judge on the facts is conclusive.

Therefore, considering this case from the viewpoint of the petitioners' failure to avail themselves of reasonable procedural remedies provided by the State of Michigan or from the viewpoint of ignoring procedural rules and examining only the testimony, it is clear that the petitioners' point is without merit.

The petitioners cite Giordenello v. U.S., 357 U.S. 480. This case concerns federal procedure under Rule 41(e) and the Court held that the district court alone had authority to consider a motion to suppress. The case is not in point in view of the authority of the examining magistrate in Michigan.

Rio v. U.S. 364 U.S. 253 cited by petitioners concerns a District Court decision holding that a search was reasonable after a California court had held the search was unlawful. This case supports the proposition that where evidence produced at the trial clearly shows the search was unlawful, the evidence must be suppressed regardless of what occurred before the trial. Respondents accept this proposition and point out that the trial court in the present case considered the circumstances of the arrest and search and except for a conflict in testimony which was resolved in favor of the people, there was no showing that the search was unlawful.

II

THE EVIDENCE WAS LAWFULLY IN THE POSSESSION OF THE POLICE AND THE PETITIONERS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE INTRODUCTION OF SUCH EVIDENCE AT THE TRIAL.

The rule is well established that a search and seizure to be lawful must be reasonable in view of the circumstances existing at the time of the search. In this case, the police officers at approximately 3:30 in the morning lawfully arrested the petitioners. At the time of their arrest they were hiding in their automobile and the police had been advised that a tire had either been placed in the trunk of their car or under the car. As pointed out in the Michigan Supreme Court decision of this case, the officers clearly had reasonable cause to believe that a felony was committed. At the time of the arrest the police officers made a search of petitioners and of the automobile, (19b) but could not get into the trunk without damaging it because the petitioners refused to give the police the key.

The officers, acting reasonably under the circumstances, took the automobile into their custody the same as they would a safe or some other property in possession of an arrested person and removed it to the police station where it could be thoroughly examined and opened without damage to the property or the stolen goods. This search was clearly an incident of the arrest and meets the most strict test of reasonableness.

The search, as a matter of fact, began at the time of the arrest and terminated when the trunk was examined at the police station.

In this regard, petitioners again ignored the facts as they existed at the time of the arrest and search. All of the cases cited by petitioners, except one, deal with residences and are clearly distinguishable from the present situation. In Rent v. U.S. 209 Fed 2d 893, the court was concerned with a search of an automobile after an arrest. However, in that case there was no search incident to the arrest.

The search in the present case is in some respects analogous to that considered in Charles v. U.S., 9th Circuit, 278 Fed 2d 386, 1960, although in that case two different searches of the person of the defendant were considered. The court states:

> "Assuredly, the second search of appellant's person for concealed weapons improving upon the earlier desultory 'frisking' would not abrogate constitutional strictures."

It follows that if a person arrested may be thoroughly searched at the police station there certainly would not be an unwarranted invasion of his privacy to have the police, where the nature of the case warrants it, make an additional and more thorough examination of his automobile after it has been taken to the station, particularly when the action of the arrested person prevented a thorough search at the place of the arrest.

Modern police practices call for a thorough examination, and by necessity such examinations, involving automobiles, cannot be made other than in a very cursory manner until the vehicle is taken to the police station where a trained technician can be called and proper lighting and other equipment is available. It is obvious that detailed examinations for such things as motor numbers, finger prints,

blood stains, hair, hidden compartments, etc. cannot be completed immediately after the arrest.

Petitioners' point is clearly without merit.

CONCLUSION

It is respectfully submitted that for the reasons stated above the petition for certiorari should be denied. There are no special and important reasons for reviewing by a writ of certiorari the Michigan Supreme Court decision in this case. Petitioners raise no federal questions of substance not previously determined by the United States Supreme Court and the decision of the Michigan Supreme Court is clearly correct.

Respectfully submitted,

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APPENDIX "A"

MOTION TO SUPPRESS EVIDENCE SEIZED

(Filed October 31, 1960)

Now come Edward John Williams and Evelyn Walker, by their attorney in fact, Albert A. Goldfarb, and request this Honorable Court to suppress evidence seized by members of the Detroit Police Department.

Fact Situation:

The defendants were arrested on September 15, 1960, at approximately three a.m., in the vicinity of 13620 Asbury Park, in the City of Detroit, a residential neighborhood, based upon a complaint from a neighbor that he thought someone was tampering with and stripping automobiles. The police responded to the scene and arrested the two defendants, who were in a crouched position in the back seat of their automobile. When asked by the police for the key to the trunk, they responded they had no key to the trunk. They were searched, and no key to the trunk was found on their person or in the automobile, although there was an ignition key. The defendants were thereupon arrested and conveyed to the Schaefer Precinct. At some time later that particular day, the police officers gained entrance to the trunk of the automobile by removing the back seat therefrom and found certain tires that were marked and identified as belonging to the complainant.

At the time of the seizure of said tires, the Detroit Police Department had no knowledge that a crime of breaking and entering of a business place had been committed. Whereupon, the police officers proceeded to the complainant's place of business, notified them of their findings, and,

upon inspection of the premises, found that the said premises had been broken into.

We feel that the evidence seized was illegally obtained by an unlawful search and seizure, and that the only evidence to support the contention that the two defendants herein named were party participants to the breaking and entering of said business establishment was illegally obtained, and; therefore, we pray that the evidence so seized should not be admitted in evidence. Further, without said evidence illegally seized, the People of the State of Michigan have not and cannot prove the defendant's participation in the crime of breaking and entering a business place in the nighttime.

• • •

(Defendants' brief in support of this motion is deleted at this point.)

Therefore, Edward John Williams and Evelyn Walker, through their attorney, Albert A. Goldfarb, pray that the evidence obtained by this unlawful search and seizure be suppressed and the defendants discharged.

Albert A. Goldfarb.

SUPPLEMENTARY MOTION TO SUPPRESS EVIDENCE SEIZED AND MOTION TO DISMISS

Now come Edward John Williams and Evelyn Walker, by their attorney in fact, Albert A. Goldfarb, and request this Honorable Court to suppress evidence seized by members of the Detroit Police Department, and dismiss the complaint and warrant and discharge the aforementioned defendants.

Accompanied with the original motion to suppress evi-

dence seized and brief in support of motion is an affidavit signed by Chester Pilat of 13620 Asbury Park, Detroit, Michigan. On September 26, 1960, an examination in the above cause was scheduled to be heard before the Honorable W. McKay Skillman, Judge of Recorder's Court acting as Examining Magistrate, at which time the defendants were prepared for an examination. On that particular occasion the officers in charge of the People's case against Edward John Williams and Evelyn Walker were not present and were later notified that they had an examination before the Honorable W. McKay Skillman. One of the detectives in charge of said case later appeared before the Honorable W. McKay Skillman and stated to the court, "I guess we goofed." Informing the court further, that it would be difficult for certain officers to be notified at this time and requested an adjournment.

Above the objection of counsel for the defense the Honorable W. McKay Skillman granted an adjournment until October 5, 1960, beyond the statutory ten-day period.

On October 5, 1960, before the Honorable Joseph Gillis, Judge of Recorder's Court, acting as Examining Magistrate, attorney for the defendant, Albert A. Goldfarb, informed the Examining Magistrate of the prior situation asserting to the court at that time, that he did not and would not waive the ten-day rule in behalf of the defendants. Mr. Goldfarb was instructed by the Honorable Joseph Gillis of Recorder's Court to proceed with the examination.

During the said examination which followed, supported by the transcript of said examination, an arresting officer stated that he had based the arrests of the defendants upon information which he received from Chester Pilat of 13620 Asbury Park, Detroit, Michigan, and attempted to state the said conversation between Mr. Pilat and himself.

The attorney for the defendants, Albert A. Goldfarb, objected to the conversation between Mr. Pilat and the arresting officer as being hearsay; however, Judge Gillis permitted the testimony for the purpose of examination.

During the direct examination of the arresting officer, he asserted that Mr. Pilat had informed him and his partner that Mr. Pilat had seen a man wheeling a tire, wrapped in paper, down the street to the car in which the defendants were later found. On cross-examination by Mr. Goldfarb the arresting officer stated that he based his arrest and subsequent search and seizure (approximately three (3) hours later the search was made of the automobile) upon the information he received from Mr. Pilat, stating in effect that fortified with the information of Mr. Pilat, that he had seen a man wheeling a tire wrapped in paper down the street to an automobile, this gave him reasonable grounds to believe that Breaking and Entering of a Business Place had occurred or a Larceny from an Automobile. Based upon the accompanying affidavit to the original motion to suppress evidence seized and brief in support of motion—in said affidavit Chester Pilat of 13620 Asbury Park asserted under oath that he had never informed the arresting officers, or any other officers, of the facts credited to be his statement. Said accompanying affidavit being part and parcel to the original motion and this supplementary motion speaks for itself.

If Mr. Pilat has affirmed in his affidavit that he never made the assertions that the officers claim that he made to them; then certainly they had no reasonable grounds to arrest, and based upon the brief submitted in the original motion an "illegal" search and seizure took place.

Further, during and after testimony was taken at the examination there was no proof or probable cause to believe

that the crime of breaking and entering a business place in the nighttime could possibly be directed and charged against the said defendants, Edward John Williams and Evelyn Walker and the People of the State of Michigan over the objections of the counsel for defense merely proved recent possession of stolen property—if a legal search and seizure did occur.

The defendants, through their attorney, hereby request, and, based upon the original motion to suppress evidence seized and the brief in support thereof and the supplemental motion herein filed, pray the Honorable Court to grant said motion to suppress evidence seized and discharge the defendants.

Albert A. Goldfarb.

APPENDIX "B"

ORDER DENYING MOTION TO SUPPRESS EVIDENCE

(Filed December 8, 1960)

At a session of said court held in the Recorder's Court Building, Detroit, on December 8, 1960.

Present: Honorable Gerald W. Groat, Judge of the Recorder's Court.

The defendants have moved to suppress evidence of an automobile tire, on the ground that their arrest was unlawful and that the subsequent search of the motor vehicle in which they were apprehended, during which the tire was found was therefore unreasonable. The motion is predicated upon the preliminary examination testimony.

One of the arresting officers, giving evidence at that proceeding, testified that he and a fellow officer drove to the scene of the arrest at 3:30 A.M., upon instructions; upon arriving they met a citizen believed to be one Pilat who reported having seen a man rolling an automobile tire, in its paper wrapping, along the sidewalk to an automobile parked at the curb, and then placing it in the vehicle; the officers approached the auto, directed the ray of a flashlight into it, and discovered the two defendants lying in a concealed posture in the front seat; defendant Williams, asked if he had a packaged tire in the automobile, answered in the negative; suspicious that a burglary or larceny had been committed, the officers placed the defendants under arrest; asked for the key to the trunk, Williams responded that he had not possessed one for years; search of Williams produced a pair of pliers in his pocket, a paring knife, tan gloves, and a hacksaw; the vehicle and the defendants were removed to the precinct police station, where a search of the automobile disclosed five new, wrapped tires in the trunk. The complaining witness identified the tires as having been stolen from his place of business in a burglary during the same night. This was not known to the officers when they made the arrest.

Over objection of defense counsel, the tires were received in evidence, and the defendants bound over for trial. The motion to suppress the evidence followed arraignment on the information. To the motion is appended the affidavit of one Chester Pilat, ostensibly the citizen described by the arresting officers, in which he denies either having seen anyone rolling a tire to the parked automobile or having so reported to the officers. The affiant represents that he told the officers of having seen a man run from the front of his home to the rear a few moments earlier.

The decision on the motion to suppress must be governed

by the examination proofs, which must for its purposes be accepted as true. The examining magistrate neither heard the testimony of Pilat nor had before him the affidavit. This court cannot now resolve disputed issues of fact, and must consequently disregard the affidavit at this juncture. Was the arrest proper under the circumstances? The answer to that question will control the decision here.

The basis for the officer's suspicion that a burglary or larceny had been committed is graphically illustrated by the following question and answer on cross-examination:

> "Q. Why did you say that you thought it might be a B and E?
>
> A. Well, * * * the man said it was a new tire in wrapping and at 3:30 in the morning there is no place open in that neighborhood to buy a tire."

A police officer's keenness and intuition, and his specialized experience, aided by native intelligence and alert perception, are reliable guides in weighing the reasonableness of an arrest. The instructions to go to the scene; the report by the citizen that he had seen a man rolling an obviously new tire to the parked automobile; the hour—3:30 A.M.; the sound judgment that a new tire could not be purchased in the neighborhood at that hour; the warranted suspicion therefrom that larceny or burglary may have been perpetrated; discovery of the two defendants, lying in the front seat of the vehicle in apparent concealment; these ingredients collectively provided an intelligent and alert officer reasonable cause to believe that larceny or burglary had been committed and that the defendants were instruments in its perpetration. The arrest which culminated the incident was therefore wholly justified; the search which

ensued was authorized by law, and the evidence of crime divulged thereby was properly received.

The motion to suppress is without merit, and it is therefore denied.

Gerald W. Groat,
Judge of the Recorders' Court.

APPENDIX "C"

STATUTES INVOLVED

Michigan Code of Criminal Procedure, Chapter VI, Examination of Offenders.

SECTION 1. The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination. (C.L. '48, § 766.1; C.L. '29, § 17193.)

SEC. 2. Whenever complaint shall be made to any magistrate named in section one [1], chapter four [4], of this act, that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him. (C.L. '48, § 766.2; C.L. '29, § 17194.)

SEC. 3. If it shall appear from such examination that any criminal offense not cognizable by a justice of the peace has been committed, the magistrate shall issue a warrant directed to the sheriff, chief of police, constable

or any peace officer of the county, reciting the substance of the accusation and commanding him forthwith to take the person accused of having committed such offense and to bring him before such magistrate to be dealt with according to law, and in the same warrant may require such officer to summon such witnesses as shall be named therein. (C.L. '48, § 766.3; C.L. '29, § 17195.)

SEC. 4. The magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace, shall set a day for examination not exceeding ten [10] days thereafter, at which time he shall examine the complainant and the witnesses in support of the prosecution, on oath in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such magistrate may deem pertinent. (C.L. '48, § 766.4; C.L. '29, § 17196.)

SEC. 5. If it shall appear that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committed to jail for trial. (C.L. '48, § 766.5; C.L. '29, § 17197.)

SEC. 6. Any magistrate to whom complaint is made, or before whom any prisoner is brought, may associate with himself one or more other magistrates of the same county, and they may together execute the powers and duties conferred upon such magistrates respectively by this chapter, but no fees shall be taxed for such associates. (C.L. '48, § 766.6; C.L. '29, § 17198.)

SEC. 7. Any magistrate may adjourn an examination for an offense not cognizable by him if the same be necessary, to the same or a different place in the county as such magistrate shall deem necessary; and in such case the accused may in the meantime be committed either to the county jail or to the custody of the officer by whom he was arrested or to any other officer; or, unless he shall be charged with treason or murder, he may be recognized in a sum and with sureties to the satisfaction of the magistrate, for his appearance before such magistrate for further examination; Provided, That no adjournments, continuances or delays of such examination shall be granted by such magistrate except for good cause shown: And provided further, That no magistrate shall adjourn, continue or delay the examination of any cause by the consent of the prosecution and accused unless in his discretion it shall clearly appear by a sufficient showing to said magistrate to be entered upon the record that the reasons for such consent are founded upon strict necessity and that the examination of said cause cannot then be had, or a manifest injustice will be done. No action on the part of the magistrate in adjourning or continuing any case, shall cause said magistrate to lose jurisdiction of said case. (C.L. '48, § 766.7; C.L. '29, § 17199.)

SEC. 8. The person accused may be committed as provided in the preceding section, by the verbal order of the magistrate, or by a warrant under his hand, stating that he is committed for such further examination on a day to be named in the warrant; and on the day therein specified, he may be brought before the magistrate by his verbal order to the same officer by or to whose custody he was committed, or by an order in writing to a different officer. (C.L. '48, § 766.8; C.L. '29, § 17200.)

SEC. 9. On the preliminary examination of every person

charged with the offense of rape, assault with intent to commit rape, seduction, adultery, bastardy or other offense against chastity, morality or decency, it shall be in the discretion of the examining magistrate to exclude from the place where such examination is held, any or all persons not officers of the court, or persons by law required to be in attendance. (C.L. '48, § 766.9; C.L. '29, § 17201.)

SEC. 10. The magistrate while conducting such examination may exclude from the place of the examination all the witnesses who have not been examined; and he may also, if requested or if he sees cause, direct the witnesses whether for or against the prisoner, to be kept separate so that they cannot converse with each other until they shall have been examined. And such magistrate may in his discretion, also exclude from the place of examination any or all minors during the examination of such witnesses. (C.L. '48, § 766.10; C.L. '29, § 17202.)

SEC. 11. Witnesses may be compelled to appear before such magistrate by subpoenas issued by him, or by any officer or court authorized to issue subpoenas, in the same manner and with the like effect and subject to the same penalties for disobedience, or for refusing to be sworn or to testify, as in cases of trials before justices of the peace; and the evidence given by the witnesses examined shall be reduced to writing by such magistrate, or under his direction and shall be signed by the witnesses respectively: Provided, That unless otherwise provided by law, the evidence so given shall be taken down in shorthand by a county stenographer where one has been appointed under the provision of any local act of the legislature or by the board of supervisors of the county wherein such examination is held, or the magistrate for cause shown may appoint some other suitable stenographer at the request of the prosecuting attorney of said county with the consent of

the respondent or his attorney to act as official stenographer pro tem. for the court of such magistrate to take down in shorthand the testimony of any such examination, and any stenographer so appointed shall take the constitutional oath as such official stenographer and shall be entitled to the following fees: $6.00 for each day and $3.00 for each half day while so employed in taking down such testimony and 10 cents per folio for typewriting such testimony so taken down in shorthand [or such other compensation and fees as shall be fixed by the board of supervisors appointing such stenographer,] and the same may be allowed and paid out of the treasury of the county in which such testimony is taken: Provided further, That it shall not be necessary for a witness or witnesses whose testimony is taken in shorthand by such stenographer above provided, to sign such testimony, but any witness or witnesses shall have the right to have such testimony read to them upon their request. Such testimony, after being typewritten, shall be received and filed in the court to which the accused is held for trial without the signature of such witness or witnesses for the same purpose and with like effect as the testimony of witnesses hereinabove provided, which is signed by such witness or witnesses and such testimony so taken shall be considered prima facie evidence of the testimony of such witness or witnesses at such examination. (C.L. '48, § 766.11; C.L. '29, § 17203.)

Sec. 12. After the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he have any, shall be sworn, examined and cross-examined, and he may be assisted by counsel in such examination and in the cross-examination of the witnesses in support of the prosecution. (C.L. '48, § 766.12; C.L. '29, § 17204.)

Sec. 13. If it shall appear to the magistrate upon the examination of the whole matter, either that no offense has

been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate upon the examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith, said magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial. (C.L. '48, § 766.13; C.L. '29, § 17205.)

APPENDIX "D"

EXCERPTS FROM EXAMINATION TESTIMONY

(Numbers in parentheses ( ) refer to pages of examination and trial transcript)

• • •

HAYES, WILLIAM:

Direct Examination

• • •

Q. (11) (By Mr. Laster): And what time was it that you arrived at that place?

A. Approximately about 3:30.

Q. A.M.?

A. A.M.

• • •

A. (12) When I got there there was a citizen out on the sidewalk who said he seen a man—

Mr. Goldfarb (interposing): I will object to that.

The Court: You got there—you received information and acting on that information what did you do?

• • •

A. (12) I went to a car and found two people hiding on the front seat of the automobile, your Honor.

• • •

Q. (13) (By Mr. Laster): What position were the people in when you came to the car?

A. In a prone position.

• • •

Q. (13) And where were they—

The Court (interposing): Now, wait a minute; did you make an arrest?

A. I did.

The Court: Then you can go into the information you received.

• • •

A. Like I said, this citizen was on the sidewalk and said he saw a suspicious man rolling a tire towards that car and he put it underneath it, and that was that—

The Court (interposing): Did he describe the tire?

A. He said it was in a—a packaged tire; in other words, it had a wrapper on it.

The Court: (14) What did that make you believe?

A. I was standing near the automobile when I asked him and it made me believe that that tire might be in that car, so I—

The Court (interposing): Well, what did you think it was?

A. I thought it might—a crime might have been committed, that's why—

The Court (interposing): Crime had been committed?

A. That a crime had been committed when a new tire was rolled down at 3:30 in the morning, so I shined a flashlight in the car and found the two people.

• • •

(14) The Court: Which two?

A. The two sitting right there (indicating)—John Edward Williams and Evelyn Walker.

The Court: All right, go ahead.

A. At that time—oh, and also in the car I found a pair of pliers in Williams' possession, it was in his pocket. I found a paring knife, tan gloves and a hacksaw, which I placed in evidence in the station when I arrested him.

The Court: Did you find any tires?

A. At that time, your Honor, I didn't find the tires until we went back and looked. We looked the station over —(15) we were investigating, trying to find out where the crime had been taking place, and after in the morning we received a run—

The Court (15) (interposing): Now, at the time you arrested these two did they have any tires in their possession?

A. No, I asked for the key to the trunk and they said that they didn't have the key to the trunk, that they hadn't had one for years, so at the time there was no tires found until the morning.

• • •

Q. (15) (By Mr. Laster): Where did you find the tires?

A. Found them in the trunk of the Defendant's car, by taking out the rear seating and going in the back way.

The Court: Well, did you bring the car—arrested the defendants and sent the car in?

A. Sent the car in and held it on evidence, yes, sir.

Q. (By Mr. Laster): How many tires did you find?

A. There was five tires in the defendant's trunk.

Cross Examination

By Mr. Goldfarb:

Q. Did you question the defendants, Edward John Williams and Evelyn Walker concerning the tires after you discovered them?

• • •

A. (16) I questioned them about the tires before they had been discovered, out on the street. I asked him what he did with the tire he was rolling and he denied having the tire.

• • •

(16) Officer, you said you went to the vicinity of Asbury Park and Schoolcraft at 3:30 A.M. on the 15th of September, 1960; is that correct?

A. That's correct.

• • •

Q. (17) Now, you went to the particular address; is that correct?

A. Yes, I did.

Q. And what did he say to you?

A. That he saw a man rolling a new tire down the street and put it into the rear of that car or underneath it; he didn't know where it went.

Q. Did he point out the car?

A. He did. I was standing—he was standing up on the sidewalk and I talked to him.

Q. Did you know the man's name?

A. (18) At that time?

Q. Do you know who he is today?

A. Yes, I understand it's Mr. Pilat.

• • •

Q. (18) Now, did he tell you when he first saw this man rolling the tire down the street?

A. Well, this is all taking place within a few minutes.

Q. Did he tell you when he first saw him roll it and from where?

A. As I understand—he just—that at that time—no, he did not, he said he seen the man roll the tire down the street to the rear of that car and put the tire underneath it or in the back of the car.

Q. Now, based on that, did you feel that there was probable cause to believe that a crime had been committed?

A. I did.

Q. And what was the crime that you thought had been committed?

A. Well, it would be either a larceny from an auto or a B and E.

Q. And did you have any knowledge of the fact that there was a B and E of this Shipley Company?

A. At that time I did not.

• • •

Q. (18) Why did you say that you thought that it might be a B and E?

A. (19) Well, from the description—the man said it was a new tire in wrapping and at 3:30 in the morning there is no place open in that neighborhood to buy a tire.

Q. This to you is what you call probable cause?

A. It is.

Re-cross Examination

By Mr. Goldfarb:

• • •

Q. (20) Now, when you first observed them you stated they were in a prone position in the front seat of the car; is that correct?

A. (21) Yes, sir.

Q. You walked over and talked to them; is that correct?

A. I had them get out of the car and put his hands on top of the car and searched him.

Q. Before you talked to them?

A. That's correct; that's when I found the pliers in his pocket.

Q. You told him he was under arrest and you searched him?

A. That's correct.

Q. Did you find the key to the trunk of the automobile?

A. I did not.

Q. Now, did you or your partner search the other defendant, Evelyn Walker?

A. I searched through her person; I did.

Q. Did you find the key to the trunk of the automobile?

A. I did not.

Q. Did you search the car to find the key?

A. I did.

Q. And did you find the key?

A. I did not.

* * *

Q. (24) (By Mr. Goldfarb): Now, at the time, did you know what crime was committed?

A. At that particular time?

Q. Yes.

A. No, I did not. I found out later, about 6 o'clock, we got a run down to that gas station on Schoolcraft and at that time we found out a tire rack had been broken into and he was rolling the tire down the street.

Q. But that was only after the arrest—some three hours later, is that correct?

A. About the—about two and a half hours, to be correct.

• • •

Q. And that was only after you had arrested them and confiscated the car and after going through the back seat of the car to get to the trunk; is that correct?

A. That is correct.

• • •

APPENDIX "E"

EXCERPTS FROM TRIAL TESTIMONY

HAYES, WILLIAM:

Direct Examination

By Mr. Hathaway:

(26) Q. All right, now at 3:30 A.M. on the 15th of September of the year 1960, will you tell us where you were?

A. I was assigned to Scout fourteen six out of the 14th Precinct in the City of Detroit. I received a radio run to Asbury Park south of Schoolcraft for—

Mr. Goldfarb (interposing): Let the record show that the witness is referring to his notes. Go ahead.

A. My original report, and received a radio run to Asbury Park • • •

• • •

(27) A. Upon arriving at the scene, I found 2 people hiding in the front seat of a '54 Olds Club Coupe • • •

• • •

(28) owned by an Evelyn Walker. In this car I found B and E Tools which I considered—

• • •

Q. (By Mr. Hathaway): Just tell us what you found in the car.

A. I found tools in the car. I found a pair of pliers in Williams pocket, I found a paring knife, tan gloves, a hack saw, and that was what they consisted of.

Q. What?

A. That the tools was a pair of pliers in Williams pocket, then a paring knife, tan gloves and a hack saw underneath the front seat.

• • •

(28) Q. All right. Now, before you went over to this car, where you claim you saw 2 people, did you talk to anybody else before you went over there?

A. I did.

Q. Who was that?

A. I talked to a Chester Pilat that lives on the corner of the alley there and he told me that he—

Mr. Goldfarb (interposing): I'll object to what he told him.

The Court: All right, sustain the objection.

• • •

(29) Q. Now, at the time that you talked to Chester Pilat, did you talk to him in the presence of either one of the defendants?

(30) I talked to him in the presence of both defendants.

(30) A. Chester Pilot told me he was on his way home and he seen a man rolling a tire down the street with wrappings on it and it was that man there.

Mr. Goldfarb: If your Honor please, I'm going to object on this basis. I think at this point I have a right to ask this witness under what circumstances the conversation took place, and until such time as we establish under what circumstances this conversation took place, then there are—we have a situation here which is paramount to the Constitutional privileges of this defendant.

The Court: Go ahead.

Q. (By Mr. Hathaway): All right. Continue.

• • •

(31) A. And that he saw a man rolling a tire down

the street and the reason that I investigated this car is that he said he seen a tire at the rear of that car and that he saw a tire underneath the back of it.

Mr. Goldfarb: Now if your Honor please, he is going far afield. Now he says—now just a second: He says he found these people in the car. Then he says a conversation took place in the presence of these Defendants. And then he comes back and says the reason I went to that car was because of this conversation.

* * *

Now it's—they're—they're inconsistent.

* * *

(31) The Court: Go ahead, get it straightened away.

Mr. Goldfarb: Well now if your Honor please, they're inconsistent in this part.

Mr. Hathaway: That's not what he's testifying to.

Mr. Goldfarb: This is what he said on the record.

The Court: All right, go ahead. Go ahead. I'm trying to clear it up if you won't let me, go ahead. Let the record show that he won't let ask the question. Go ahead.

A. The—well in the—then in the presence of the 2 people there, we were all standing in a circle.

A. The 2 defendants. Two other—3 other Policemen and myself were all standing in a circle, and—

The Court (interposing): That's what I'm trying to clear up.

A. (Continuing): —and he said, "Don't let them 'scene' I had the tire."

(32) Q. (By Mr. Hathaway): All right. Now for the sake of the record, will—you also had a conversation; don't tell me what it was. You also had a conversation with Chester Pilat before you went over to these two defendants?

A. That is correct.

• • •

(32) Q. All right. And you also had this conversation with Chester Pilot and the—in the presence of the defendant which you just testified to?

A. That is correct.

Q. Okay. Now after you had this first conversation with Chester Pilot, you claim you went over to a car occupied by these 2 defendants' is that right?

A. That is correct.

Q. All right. And you said this car was a house away from this gas station, is that right?

A. That would be 2 houses, Chester Pilot's that would be the first and that would be the second.

Q. All right. Now where—will you tell us how they were situated in this car.

(33) A. They were laying prone across the front seat.

Q. They were laying prone across the front seat. All right. And they both were laying prone?

A. Well yeah, well it would be like one would be facing west and one laying east, laying prone.

Q. All right. And this was at 3:30 in the morning?

A. That is correct.

Q. They had the lights on in their car?

A. They did not.

Q. All right. Now what happened; what conversation did you have with the Defendants' at that time; what occurred?

A. I inquired of the defendants' what they were doing in the neighborhood, and they said, "Nothing." I then inquired if they had the key to their trunk and he told me that he didn't have a key to the trunk, that the trunk wouldn't open. Upon that I found some cardboard boxes that had been thrown on the lawn, and I asked how he got those out to throw out and he said that they were in the rear seat. And I asked him why he threw them out, and he said, "Just to make room." And then, that is after—that's when I took him into the station with these tools and stuff.

Q. All right.

A. And arrested him.

Q. All right. Now, while you were—you left Chester Pilot (34) and went over to the car and started questioning these 2 defendants, and then, did Chester Pilot come up to you?

A. Like I say, we were all standing in a circle there at the time. I had already searched the 2 of them to make sure they had no weapons or anything.

Q. All right. Then Chester Pilot came up and made these statements which you just testified to, right?

A. That is correct.

Q. All right. Now will you point out these 2 people whom you claim were in this car?

A. Sitting right behind the counsel there, the 2 people there. (Indicating.)

Q. Let the record show the witness identifies the defendants', Edward John Williams, and Evelyn Walker.

Now did you question the defendant yourself farther?

Q. (Interposing): —After you claim Mr. Chester Pilot made these statements?

A. I questioned him as to the key of the trunk, and he told me that it hadn't been opened for a long time, and I went through the car real good. And upon finding these tools and I had reasonable—I thought I had reasonable cause to believe—

Mr. Goldfarb (interposing): I'm going to object (35) to that.

Mr. Hathaway: As well as—

Mr. Goldfarb (interposing): Just tell — answer the question what you found?

A. No, I took them into the station and arrested them for investigation, B and E, Business, Night Time.

Q. (By Mr. Hathaway): All right. Now, did you look in the trunk?

A. I could not look in the trunk at that time.

Q. Why, you didn't have the key?

A. I did not have the key.

Q. All right. Now where did you claim all these tools were located in the car?

A. Well the pliers was in Williams pocket, the hack saw, gloves, and paring knife was under the front seat.

Q. All right. Anything else you enumerated all the tools that were in the car.

A. No, that—outside of taking the reports and the statements and taking them to the 14th Precinct and arresting them.

Q. All right. Let's have these marked first.

(Whereupon People's Proposed Exhibit No. 3 was marked.)

Q. (By Mr. Hathaway): All right. Now I'll show you People's Proposed Exhibit No. 3 and ask you if you can identify that exhibit.

(36) A. Yes, I can. This is the hack saw we placed under Red Evidence Tag, and that's the initials of my partner which he marked in my presence.

Q. All right. Where did you first see that hack saw?

A. Under the front seat of this car, '54 Olds.

Q. Is that the car of the defendant you've already identified?

A. That is correct.

Q. All right. Did you question him about that hack saw at that time?

A. I did.

Q. What did he say?

A. He says that it was just under there, he didn't know any reason for it being there.

Q. Okay. I'll show you People's Proposed Exhibits No. 4, and ask you if you identify those exhibits, and Proposed Exhibit No. 4?

A. Yes, I can identify the gloves for the same reason. There are the initials, my partner's which was done in my presence while I was making the report.

Q. That's all right. Take your time.

A. Yeah, I can't see the—

Q. (Interposing): Is the sunlight in your way?

A. I know there is a marking on them because we marked everything right there. Oh, there it is, see it right there, that was (37) hard to put initials in, so we marked it with an "x". And this one with an "x". I know it was on there.

Q. All right. You claim that you marked that, you or your partner in your presence marked the pliers with an "x" and a small paring knife with an "x"?

A. With an "x".

Q. Is that right?

A. That is correct.

• • •

Q. All right. Now these pliers and paring knife and gloves in Exhibit No. 4, you claim you got those where?

A. Under the front seat of Evelyn Walker's car.

• • •

A. (Interposing): I found the pliers in Williams' pocket.

Q. In Edward John Williams' pocket?

A. That is correct.

Q. Well whose car was this?

A. This was Evelyn Walker's car.

Q. Well she wasn't driving the car though?

A. No, she wasn't driving the car, they were both laying prone in the front seat.

Q. You couldn't tell who was driving at that time, right?

A. Well I remember Williams being behind the driving wheel when—I mean she was on the other side at the time I got (38) them out of the car.

Q. How did you find out it was Evelyn Walker's car?

A. By her registration that she had for the vehicle; Michigan registration; in her name.

Q. And did these people live in front of this residence that they were parked in front of?

A. They did not.

Q. What addresses did they give you, if they gave you any?

A. Well Edward John Williams gave me an address at thirteen thousand and four-Orleans, Evelyn Walker gave me an address of five five nine Belmont.

Q. Have—of your own personal knowledge, do you know whether or not those addresses are near this spot?

A. My knowledge of the City of Detroit, they're quite a ways from this spot.

• • •

(39) Q. (By Mr. Hathaway): All right. Did you have any further conversation that—what you've already related in regard to Exhibit No. 4, which are the gloves, the pliers, and the paring knife with this—these defendants'?

A. Well I—like I stated, I asked him what they—the reason they had them for, and he said that they were just underneath the front seat, no reason for them being there. He wouldn't give me a reason for them.

Q. And was Edward John Williams the one that was doing the talking to you instead of the girl, is that it?

A. Mostly, I was talking to him, yes.

Q. Well you didn't—in other words, the girl didn't give you any answers on these—this hack saw or the knife and the gloves and the pliers?

A. No.

Q. All right. Did you—did you have any further conversation at this time or later on than what you've already testified to with either one of these defendants?

A. I did not.

Q. All right. I'll show you People's Proposed Exhibit No. 5 which consists of 2 boxes and I'll ask you if you can identify those boxes?

(40) A. Yes, I can identify it by the initials right

here in the corner and by the similarity and by the evidence tag and here they are on this box.

Q. Okay. Will you tell us when you first saw those articles in Exhibit No. 5, sir?

A. I saw those up on the front lawn in front of the second house there on Asbury south of Schoolcraft. I asked Williams why he threw them out, and he says he threw them out to make room. And I said, threw them out to make room; you have a key for your trunk, and he said that they were in the back seat of his car and he threw them out from there.

Q. But he originally told you he threw them out to make room for what?

A. He just said to make room.

Q. (By Mr. Hathaway): Oh, to make room. You were the one that asked him if he threw them out of his trunk?

A. Yes.

Q. And in answer to that question he said he threw them out to make room? And what did he say later on?

A. I asked him if he threw them from the trunk and he said that he did not, that he threw them from the rear seat of the car; they weren't in the trunk.

• • •

(41) Q. (By Mr. Hathaway): All right. Did you question him about what was in the back seat of his car in order to make room for these 2—to make room for something else?

A. Yes, and he wouldn't give me any answer.

Q. What was in the back seat?

A. Nothing.

• • •

(42) (By Mr. Hathaway): I'll show you People's Proposed Exhibit No. 1, and ask you if you can identify that?

A. Well I can say that that's similar to the one that was on the sled, I didn't put no identifying marks on it.

Q. All right. Was the steel bar that you saw cut like that?

A. It was.

(43) Q. All right. Now and then you talked to Mr. Shipley, is that right?

A. Talked to—

Q. (Interposing): No, don't tell us what—

A. (Continuing): —talked to Mr. Charles Rose at that time.

Q. Oh, Mr. Shipley wasn't there?

A. That is correct.

• • •

The Court (interposing): Well you got up there the next morning, did you do anything; did you go back home, go back to work, or what?

A. Well we took a report of a B and E tire rack, you Honor.

The Court: I see.

A. Of this, then we went back to the station.

The Court: All right.

A. And investigated the car that we had in the pound.

Q. (By Mr. Hathaway): All right. You went back to this—

Mr. Goldfarb (interposing): May I ask what time this was?

The Court: Seven.

A. Seven, approximately 7 in the morning.

Mr. Goldfarb: Okay.

Q. (By Mr. Hathaway): All right. Then you went back to the pound where you keep the cars, is that right?

(44) A. That is correct, where we impound the cars.

Q. Well did you or did anybody in your presence open up this car?

A. No, my partner opened the car, I had a school crossing to do; I went to the school crossing and he opened the trunk of the car.

Q. Well wasn't—it wasn't in your presence?

A. It was not.

Q. You don't know any—you never saw the trunk after it was opened or anything?

Cross Examination

By Mr. Goldfarb:

• • •

(46) Q. But there is no place on here—in reference to the fact—

The Court (interposing): He said no; didn't he?

Q. (By Mr. Goldfarb): Well now you say that when you approached the address on Asbury Park, you met a Mr. Pilot?

A. That is correct.

Q. And that from there you went directly to the car, is that correct?

A. He said that was a strange car in the neighborhood and he saw a man with a—

Q. (Interposing): I didn't ask you that and I ask that it be stricken, your Honor.

The Court: It may be stricken.

Q. (By Mr. Goldfarb): You had a conversation with Mr. Pilot, you say?

A. I did.

Q. And from there you went where?

A. To the car.

Q. To the car and found 2 individuals lying in a prone position, is that correct?

A. That is correct.

Q. Is that when you placed them under arrest?

A. That is correct.

Q. And after arresting them you searched the car?

(47) A. That is correct.

Q. That's when you found the saw?

A. That is correct.

Q. That's when you found the pliers?

A. Well when—when I searched for the gloves and the paring knife.

The Court: That's right.

A. When I searched Williams I found the pliers on him, then I found the rest on the front seat.

Q. (By Mr. Goldfarb): All right. Now you asked for a key to the front seat, isn't that correct?

A. That is correct.

Q. And you searched for a key on the person of both defendants, didn't you?

A. That is correct.

Q. You didn't find one?

A. I even searched the ground there.

Q. You took your flashlight, you and your associate, and your partner went—

The Court (interposing): Well he didn't find the key.

Q. (By Mr. Goldfarb): And went around and looked for the key and you didn't find it?

A. No, I did not.

Q. Then you had them leave the car and come out on the sidewalk, (48) isn't that true?

A. Well, we, I believe we were all standing in front of the car of—of Walker, Evelyn Walker's car. We were all standing there, there's a driveway right there, and we were all standing there, part on the drive and part on the street. We were all there.

Q. But up until that particular time, you hadn't seen the tire?

A. I had not.

Q. You placed them under arrest?

A. I had.

Q. And you conveyed them to the Precinct, is that correct?

A. I did.

KUNKA, MORRIS:

Direct Examination

By Mr. Hathaway:

(52) A. * * * I saw a couple of cardboard boxes on the grass, and I said to my partner, "There's the boxes." So we stopped our car about then, fourteen six came from the other side and stopped also. In the driveway of the first house was a car parked with a lady and a man in it.

The man "drive" (sic) the car and walked towards us and I recognized him as Mr. Chester Pilat, who I've known about 20, 25 years. I said, "Hello, Chester, how are you?" He says "Hello, Mo." He says—

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A. Chester Pilat walked and he said, "As I drove home, my lights hit a colored man sitting behind this car, here, and he ran into my yard." He said, "I think he may be in my (53) house." So I said, "I'll go into your house with you." So then I got out of the car and went with Mr. Pilat and searched his premises. We found out that the house had not been broken into and nobody had entered his house. And on the way walking out, Chester Pilat said to me, "Mo, this car does not belong here. It's a strange car." So I hollered to Patrolman Hayes to look in that car, that car don't belong here. That's when Patrolman Hayes shined his light on the car and found the defendants in the front seat. He (53) had to come out; and we talked to him, while we were all talking to him, the 4 officers', the 2 Defendants', Mr. Pilot was there, and we were there, and Mr. Pilot did mention that the man had a tire laying on the street directly underneath the trunk of that car; wasn't there then, so I asked the Defendant, "What did you do with the tire?" He said, "What tire; I don't know nothing about a tire." I said, "Give me the key to your trunk." He said, "I don't have a key to the trunk." He did admit being the man behind the car that ran through the yard, but he said he ran through the alley because he had to go to toilet. And he kept insisting there was no tire, and Mr. Pilot then says, don't let him lie to you. The tire was laying right there underneath the trunk on the street. So that is why we took him in.

Q. Well was there any conversation in the presence of the (54) Defendant by Mr. Pilot in regard to wrappings on this tire?

A. Mr. Pilot said it was a brand new tire all wrapped up laying right there, and don't let him lie to you.

Q. Was—do you know when Edward John Williams was put under arrest or not?

A. He was put under arrest after all this conversation.

* * *

Mr. Hathaway: * * * who put him under arrest, did you put him under arrest.

A. We all talked it over and said let's take him in and place (55) him under arrest.

Q. Did you put him under arrest as much as anybody else at the scene?

A. Yes, I did.

* * *

PILAT, CHESTER:

Direct Examination

By Mr. Hathaway:

(59) Q. All right. Now on the 15th of September, of the year 1960 (60) at around 3:30 A.M., will you tell us where you were?

A. I was just pulling in the driveway, and just then a police officers' car pulled up, so I got out of the car and

I walked up to the police officers, and I asked them what's going on. And they said they had a complaint, and they asked me if I seen anything, and I told them just before I pulled in the driveway, somebody ran between the houses. And that's all I seen.

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(59) Q. All right. Now on the 15th of September, of

(60) Q. All right. Well what happened, did you see what happened to that person who ran between the houses?

A. No, I did not.

Q. All right. Did you see—did you see an unusual car out on the street there or not?

A. Yes, there was—

Q. (Interposing): Where was it?

A. It was between my home and the next door neighbors home between the driveway.

Q. All right. Did you tell the police about that car?

A. Yes.

Q. What did you tell them?

A. I just told them this car doesn't belong here, it's a strange car.

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(61) Q. Where was this person when you first saw him who ran between the houses?

A. Running from the street to the driveway and between the houses.

Q. How far was he away from the car when you saw him in the street?

A. Oh, I'd say almost up to the sidewalk. From the street to the driveway to the sidewalk.

Q. Would it be about 2 feet or 5 feet, how far away from the car?

A. Oh, I'd say about 15 feet.

Q. About 15 feet?

A. Yes.

The Court: You told the officers' it didn't belong there?

A. I did not.

The Court: You told the officer that?

A. Yes.

Q. (By Mr. Hathaway): What officer did you talk to?

A. That officer there. I walked up to the car.

Q. Do you know his name?

A. Yes, Mo. I've known him for a long time.

Q. Do you know his last name?

A. Kunka.

Q. All right. What conversation did you have with him?

(61) A. Well I just told him that—they said they had a call there. (62) and I—and they asked me what's wrong, and I asked him well what's happening over here, and they said they had a complaint, something going on on Asbury

Park. I told them I just pulled in the driveway and I seen somebody run between the houses.

Q. Did he go into the house with you?

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(62) A. Yes. I had him check the house because I thought that the person who ran between the houses might have broken into the home, you see.

Mr. Goldfarb: I'll object to that your Honor as calling for a conclusion.

The Court: What?

Mr. Goldfarb: The fact that he thought that the persons running between the houses might have broken into it.

The Court: Oh, that's all right. Let it stand.

Q. (By Mr. Hathaway): Did you call the police?

A. No, I did not.

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Q. (By Mr. Hathaway): When did you tell the officers about this car?

A. I believe it was when I got to the car when I talked to him.

Q. All right. What did you tell him about this car?

(63) A. I told him it was a strange car and that it did not belong there. I've never seen it before this.

Q. Did you say anything else?

A. No, all I said was that I seen somebody running between the houses, that's all.

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(63) Q. Did you say anything to him about somebody taking a wrapped tire down to that car?

A. I did not.

(63) Q. Did you see the boxes on the street?

A. The boxes I seen on the lawn, yes. There was one on this side of the sidewalk and one on the other side of the sidewalk towards the street.

Q. When did you notice those boxes out there?

A. I noticed those boxes out there when I was pulling out of the driveway.

Q. Were they near this car that was parked?

A. I'd say maybe 8, 10 feet away from the car.

Q. All right. Did you point out those boxes to the officers or not?

A. Yes, I said those boxes don't belong on the lawn; I never seen them before.

Q. All right. After you had that conversation with the officers, what happened; what did the officers do?

A. Well they ran between the houses and they checked the yard they checked the alley, and then I told them to check the (64) home, he come in the home with me and checked the house if somebody broke in, see.

Q. All right. When did—after you told them about the car, did they check the car or not?

A. I don't think they checked it right away.

Q. All right.

A. They were first talking then they checked the car.

The Court: Well

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Q. (By Mr. Hathaway, interposing): Did they check the car as soon as you told them about the car?

A. No, they did not.

The Court: Well they did check the car though?

A. Later on they did check the car, yes.

The Court: All right.

Q. (By Mr. Hathaway): What happened at the time they checked the car?

A. They found—they found 2, 2 people hiding in the seat; they were laying down in the seat.

Q. Were you out there at that time?

A. Yes.

Q. All right. Did the 2 people get out of the car?

A. I believe the officers told them to get out of the car, and they got out of the car.

Q. All right, now what happened after they got out of the car?

A. I don't know whether they placed him under arrest or not; I (65) don't know.

Cross Examination

By Mr. Goldfarb:

(66) Q. Now did you see anybody rolling a tire down the street—

A. (Interposing): I did not.

Q. (Continuing)—with wrapping on it; did you tell the officers that you saw somebody rolling a tire down the street?

A. I did not.

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Q. Did you tell the officers that you saw somebody place the tire underneath the car?

A. I did not.

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Q. When was the first time you saw me, Mr. Pilot?

A. The first time when you called upon me at the home, and you asked me what happened, and I told you. And you asked me if I would sign an Affidavit to that, so you came back and I signed the affidavit.

Mr. Goldfarb: May I have the files for just a moment please?

(67) The Court: The tires you seen those, rolled

A. (Interposing): I did not see it.

The Court: The officer said—

A. (Interposing): The officer they said that they seen—I said that they seen; that I told them that I seen the tire and I did not see the tire.

BLACK, DONALD:

Direct Examination

By Mr. Hathaway:

(74) Q. All right. Well, tell me what occurred when you went out to the vicinity of the gas station at 3:30 in the morning?

A. Well, we had a run to Asbury Park, south of Schoolcraft. Suspicious man threw something out of a car. We arrived there immediately behind another scout car that backed us up on the run. We got out of the car, and there were 2 boxes, one sitting by a car, and one up on a lawn. While we were checking the boxes, one of the officers was talking to a man in civilian clothes * * * They all left and checked the neighborhood. I stayed by the boxes out in the street. They came back, and while I was looking at the name on the boxes, the conversation was that somebody had seen a man with a tire by the car on the street.

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A. Then somebody said that was a strange car to have it checked. My partner went over to the car, he shined a light

in it, and 2 people sat up. (75) I went around to the opposite side of (76) the car, as the 2 people got out on the other side. The I walked back, and they were talking to him and I asked for a key to the trunk, and they—I was told that, by Edward Williams that he didn't have a key, that the trunk hadn't been opened in about a year. So I checked the car on the inside as far as I could go with it. And when I walked around to the other side of the car, I lowered the 2 boxes in our scout car; the cardboard boxes, and we took the defendants' to the station.

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(76) Q. Was that car placed in the pond?

A. Yes, it was, we took it in with us.

Q. All right. Who searched—were you one of the officers that searched the car or not, later?

A. Yes, I was.

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Q. When was that; did you also go to the gas station in the morning?

A. Yes, I did.

Q. All right. After you went to the gas station in the morning, you went back where?

A. I went back to the station with a report of a B and E.

Q. All right. Did you search this car at that time of Edward John Williams and Evelyn Walker were in that night?

A. Yes, I did.

Q. All right. How did you search them; what did you do?

(77) Q. What time was this?

A. Seven-thirty A. M.

(77) Q. All right. Did you open the trunk?

A. We couldn't open the trunk, I had to remove the back seat, the back rest in the back seat.

The Court: All right, what did you find?

Q. (By Mr. Hathaway): What did you find in there?

A. I found 5 tires, 3 of them I could reach, and I took out—the other 2 were by the back bumper. I couldn't reach them with my uniform on, I couldn't crawl in, I made a report to that effect that 3 tires were removed from the trunk, and 2 left in the car.

Q. All right, can you identify those tires?

A. Yes, I marked all of them; all but 2 I couldn't reach.

Mr. Goldfarb: All right; we'll admit that those are the tires he found in the trunk.

The Court: All right.

Q. (By Mr. Hathaway): All right. People's Exhibit —all right. You'll stipulate that this officer—that the Exhibit No. 2 are the same 5 tires that this officer took out of the car that the 2 defendants were in?

Mr. Goldfarb: No, that's not what I said. I said I'll stipulate that those were the tires that were in the trunk.

(78) He stated he took 3 tires out and left 2 in, I will stipulate to that.

The Court: All right.

Q. (By Mr. Hathaway): Well, all right. You took 3 out and left 2 in the trunk?

A. Yes, I couldn't reach 2 of them. They were by the back bumper.

Mr. Hathaway: You'll stipulate that these are the five?

Mr. Goldfarb: That's what I already have.

Q. All right. Anything else from this witness; cross examine (78).

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Re-direct Examination

(81) By Mr. Hathaway:

Q. Did you see this witness, Chester Pilot, in Court today?

A. Yes, I seen him when Mr. Kunka there pointed him out.

Q. All right. Now on this night, you claim you were there at 3:30 in the morning when Edward John Williams and Evelyn Walker were arrested, is that right?

A. Yes, I did.

Q. All right. Now in the presence of these 2 defend-

ants, did you hear Chester Pilot make any statement in regard to these 2?

A. No.

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A. No, I didn't at that time. Like I say, when I asked for the key to the trunk, and he said he didn't have it; I went back and I started checking on the inside of the car again.

The Court: The answer is "no" then.

Q. (By Mr. Hathaway): Well you never heard Chester Pilot make any statement then at all, is that it?

A. No, not after that.

Q. All right.

GALLERANI, CLAVIO:

Direct Examination

By Mr. Hathaway:

Q. Now on the 15th of September, at 3:30 in the morning, did you go to the vicinity of Shipley Standard Service?

A. Yes, sir; we did.

A. I was in company with Patrolman Kunka assigned to scout fourteen seven.

Q. All right. What happened when you first got there?

A. Well when we first got there, we took and drove around, because the run came over, suspicious man throw-

ing something out of the car. We drove around, and then we came back (83) through the alley, and then that's when the fellow in the car, Mr. Pilot saw us over there, and we started talking. And then he took and told us that as he was driving up, he saw somebody run in between the houses.

Q. All right. Go ahead.

(83) A. And then, he asked if we could go into the house with him because he thought that maybe the house might have been broken into, so at that time, Patrolman Kunka went with him, and I took and went around the back yard.

Q. All right, what happened next?

A. Came outside and at that time there I observed the boxes on the front lawn, and then there was a conversation that transpired and somebody did mention a tire.

Q. Who did they mention it to, to you, did you hear it mentioned?

A. No, no, I did not—I did not hear who it was mentioned to.

Q. How did you hear it mentioned?

A. Because I distinctly heard the tire.

Q. All right. What happened after; do you remember anything else besides the tire, where it was, whether it was wrapped or not; or do you just remember a tire was mentioned?

A. I just remember that a tire was mentioned.

Q. All right. Then what's the next thing that happened?

A. Well then Patrolman Kunka, he told Patrolman Hayes, that that was a suspicious car, or that was a strange car, so then Patrolman Hayes went over and took a look in it. (84) and we found the 2 people lying prone in the front seat.

Q. All right. What's the next thing that happened after that?

A. Well then we asked them to get out of the car, and—

Q. (Interposing): Did you see them laying in the car or not?

A. No, I did not.

Q. All right. Go ahead.

A. So they came out of the car and—

Mr. Goldfarb (interposing): Who asked them to get out of the car?

A. Sir?

Mr. Goldfarb: Who asked them to get out of the car?

A. I don't know.

Mr. Goldfarb: You didn't?

A. No, sir, I did not.

Mr. Goldfarb: That's all.

The Court: Does he know anything more about it than the other witnesses?

Mr. Goldfarb: No, your Honor.

Mr. Hathaway: Well I'm informed that he does.

The Court: What?

Mr. Hathaway: I'm informed that he does.

The Court: Well ask them.

(84) Q. Did you hear Chester Pilat make any statement?

(84) A. I heard a statement made about the tire under the back of the (85) car, that, that's when we—

(85) The Court (interposing): Now listen, he said did you hear Chester Pilat make any statement?

A. Did I hear him?

The Court: Yes.

A. No, sir.

The Court: Yes, that's what he asked you.

A. No, sir, I did not hear Chester Pilat make any statement.

(85) Q. (By Mr. Hathaway): All right. In the presence of Chester Pilot and the defendants did you hear anybody make a statement about the tires?

A. Yes.

Q. All right. What was that?

A. There was a tire under the back of the car.

Q. All right.

A. Then we asked him for the key for the trunk, and then he said he did not have the key for the trunk.

Q. Do you know what kind of a tire they were talking about or not?

The Court: Now wait a minute.

Q. (By Mr. Hathaway): If you know; if you know?

The Court: Goodrich, or—

Mr. Hathaway (interposing): No.

The Court: What kind?

Q. (By Mr. Hathaway): Was it wrapped or unwrapped?

A. Just a tire.